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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1975

No._____
STATE OF WYOMING, ET AL., PETITIONERS
v.
THOMAS KLEPPE, Secretary of the Interior, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The State of Wyoming, and others, petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. 13-27) is reported in 525 F. 2d 66. The judgment of the Court of Appeals pursuant to said opinion (App. B, *infra*, pp. 29-30) is not reported.

The initial order of the Environmental Protection Agency, designated as Pesticides Regulation Notice 72-2 (P.R. 72-2), which was the basis for the institution of the action by petitioners in the United States District Court for the District of Wyoming appears in App. C, *infra*, pp. 31-40.

The judgment of the United States District Court for the District of Wyoming granting petitioners a preliminary injunction against the Environmental Protection Agency appears in App. D, *Infra*, pp. 41-43.

The order of the Tenth Circuit Court of Appeals denying rehearing and a nunc pro tunc order pertaining thereto appear in App. E, *Infra*, pp.45-46.

JURISDICTION

The opinion of the Court of Appeals was issued October 28, 1975, (App. A, *Infra*, pp. 13-27). The order of the Court of Appeals denying rehearing (App. E, *Infra*, pp. 45-46) was entered November 24, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

OUESTIONS PRESENTED

The first question presented is whether, under the National Environmental Policy Act, the Environmental Protection Agency is exempt from the statutory requirement of filing an enviromental impact statement prior to taking, as a federal agency, a major federal action.

The second question presented is whether actions other than the issuance of an environmental impact statement by a federal agency may satisfy the statutory requirement of an environmental impact statement under the National Environmental Policy Act.

STATUTE INVOLVED

Section 102 of the National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332, provides in relevant part:

"(2) all agencies of the Federal Government" shall—

* * * * * * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

STATEMENT

A. JURISDICTION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

The complaint and amended complaint in the United States District Court for the District of Wyoming of petitioners alleged that the United States District Court for the District of Wyoming had jurisdiction over the subject matter of this case and of the parties pursuant to 28 U.S.C. 1361 (Mandamus), 28 U.S.C. § 2201-02 (Declaratory Judgments), 5 U.S.C. § 701, et seq. (Administrative Procedure Act), 7 U.S.C. § 135, et seq. (Federal Insecticide, Fungicide and Rodenticide Act of 1972 (FIFRA), 7 U.S.C. § 136, et seq. (Federal Environmental Pesticide Control Act of 1972 (FEPCA)), 42 U.S.C. §§ 4321, et seq. (National Environmental Policy Act (NEPA)), 16 U.S.C. §§ 668AA through 668JJ (Endangered Species Act), 28 U.S.C. § 1651 (All Writs Act). Said complaint also alleges that the matter in controversy exceeds $10,000.00 exclusive of interest and costs.

The District Court found that it had jurisdiction upon motions to dismiss filed by the Government. Subsequently, jurisdiction of the United States District Court has not been put in issue.

B. ENVIRONMENTAL PROTECTION AGENCY ACTION

By the issuance on March 9, 1972, of its P.R. 72-2 notice (App. C, *Infra*, pp. 31), the Environmental Protection Agency (EPA) banned the interstate shipment of three toxicants being used in federal, state and local cooperative programs to control predators, mainly the coyote. This action was taken under the provisions of the Federal Insec-

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ticide, Fungicide and Rodenticide Act (FIFRA), which was later amended.

It is undisputed in this case that the issuance of such order by the EPA was a major federal action. It is undisputed in this case that prior to the issuance of such order the EPA did not, under § 102 of the National Environmental Policy Act of 1969 (NEPA), the relevant parts of which are quoted above, prepare an environmental impact statement (EIS).

The record does disclose that the Department of the Interior, one of the defendants below, had prepared a draft EIS covering its predator control program using chemical toxicants. Prior to its being filed, however, two actions were instituted in the United States District Court for the District of Columbia against the Secretary of the Interior, and others, seeking injunctions against the use of these toxicants. The Government defendants in those cases entered into a secret stipulation, filed "under seal," agreeing with the plaintiffs to terminate the then existing predator control program using toxicants by February 15, 1972. In return, the plaintiffs were not to pursue their motions for injunctions. The Cain Report was referred to in this stipulation, even though not then completed or published, as the basis for such action. As a result of the stipulation, the draft EIS, which unequivocally supported the then existing control program, was never filed. Work on the draft EIS was at that point discontinued by the Department of the Interior.

C. THE DISTRICT COURT'S DECISION

The District Court's decision, entered June 23, 1975, (App. C, *Infra*, pp. 31-40), granted to the State of Wyoming and the other plaintiffs below a preliminary injunction against the EPA and mandated that agency to revoke its order P.R. 72-2 (App. C, *Infra*, pp. 31-40) and also enjoined the EPA from any attempted enforcement thereof. The District Court found that petitioners had been denied due process because they had never been afforded an opportunity to be heard by the EPA prior to the issuance of the ban. That decision was based upon the hearing which was held before the

United States District Court for the District of Wyoming, at which all parties were represented, and evidence was introduced only by plaintiffs, who are the petitioners herein. The Government introduced no evidence at this hearing. The evidence submitted on behalf of petitioners herein showed irreparable damage to the livestock industry in the State of Wyoming, particularly the sheep industry, had resulted directly from the EPA ban order. Losses of sheep and lambs to predators, particularly the coyote, were shown to have increased dramatically in direct relation to the decrease in the use of the banned toxicants. This evidence also demonstrated that the other methods of predator control attempted by federal, state and local cooperative programs accounted for only a small portion of predator control and that the use of toxicants was the only practical and economic method which should be used.

In the District Court it was also noted that the Department of the Interior is under a federal statutory duty to control predators and to carry on programs not only of actual control, but also of research in connection therewith (7 U.S.C. 426). Two individual ranchers testified as to their own losses and the increase in them as a result of the ban and the Commissioner of Agriculture of the State of Wyoming testified concerning the losses over the State and the adverse economic affect upon the sheep and cattle industries. The Cain Committee Report was introduced into evidence and was also considered by the District Court.

At the conclusion of the hearing, the United States District Court for the District of Wyoming entered its preliminary injunction (App. D, *Infra*, pp. 41).

D. THE COURT OF APPEALS DECISION

Under federal statutory authority, the Government appealed the District Court decision to the Court of Appeals for the Tenth Circuit. The Court of Appeals did not question the sufficiency of the evidence before the District Court to sustain injunctive relief, nor did it question the jurisdiction of the District Court over the parties or the subject matter of

the action. As will appear from the Court of Appeals decision (App A, *Infra*, pp. 13-27), the specific issues considered by the Court of Appeals were two: *first*, whether the Administrator of the EPA was required to prepare a formal EIS prior to taking action suspending and canceling the chemical toxicants registration under FIFRA; and, *second*, whether there had been a substantial compliance with the requirements of NEPA by the Administrator as a result of his having taken into account the so-called Cain Report.

Although the Government raised the issue of a failure on the part of petitioners to file a direct appeal of the EPA order with the Court of Appeals, its decision in no way was based upon this ground, and the Court of Appeals entertained jurisdiction to decide the two issues set forth above. It is a fact that on the basis of the EPA order P.R. 72-2, the Administrator of the EPA had refused requests of the State of Wyoming for the registration, reregistration, experimental and emergency use of the chemical toxicants. The EPA, subsequent to the hearing before the District Court and one day after the argument before the Court of Appeals in this case, after a review of the use of one of the three toxicants, namely sodium cyanide, and based upon hearings which are the only hearings ever held in this regard, reversed its prior position and issued a limited registration for use of sodium cyanide by the State of Wyoming and by the Department of the Interior. This demonstrates clearly the error of the EPA in summarily banning use of sodium cyanide among othe toxicants without hearings and without any input from the public or from those affected.

The record in this case will further disclose the fact to be that the three toxicants involved had been used for some fifty years in the State of Wyoming with the only registrant being the Federal Wildlife Service. As noted by Judge Seth in his dissent in the Court of Appeals decision, "This does not appear to be anything close to imminent danger for an 'emergency' contemplated by any relevant Acts."

The majority opinion in the Court of Appeals on the first issue was based entirely upon the assertion that "The sub-

stance of NEPA is such as to itself exempt EPA from the requirement of filing an impact statement."No provision of the NEPA statute was cited by the Court of Appeals as providing an exemption for the EPA from the requirement of filing an EIS. Also, the Court of Appeals did not cite a decision of any other court so holding. Research in this case reveals to petitioners that, until the Tenth Circuit of Appeals decision in this case, no other court had by decision exempted the EPA from NEPA requirements except in the so-called "Clean Air Act" cases, epitomized by *Portland Cement Association v. Ruckelshaus*, 486 F. 2d 375, (D.C. Cir. 1973), where a complete procedure is established which must be followed by the EPA, which makes the filing of a formal EIS unnecessary.

The Court of Appeals also cited *Environmental Defense Fund v. EPA*, 489 F. 2d 1247, (D.C. Cir. 1973), which is a "functional equivalent" case and has to do with the second issue presented in this petition. The Court of Appeals also cited *United States v. Students Chal. Reg. Agcy. Pro.* (SCRAP), 412 U.S. 669 (1973), in support of its conclusion that the EPA is exempt, which case involved only the question of whether or not the requirements of NEPA could be used to question rates promulgated by the Interstate Commerce Commission.

The Court of Appeals decision was contrary to the statement of John A. Green, Regional Administrator, U.S. Environmental Protection Agency Region VIII, contained in a letter to the Denver Post of September 26, 1975, (App. F, *Infra*, pp. 47-48), which states in part as follows:

> "EPA is not responsible for administering the National Environmental Policy Act. *EPA is subject to the requirements of that act the same as every other federal agency.* (emphasis added)

That Congress could have exempted the EPA from the requirements of NEPA is evidenced by EPA's successful seeking of a Congressional exemption from NEPA from its regulatory actions under the Federal Water Pollution Con-

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trol Amendments of 1972 (§ 511(c) (1)), which provides as follows:

> "(c) (1) Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 201 of this Act (33 USCS § 1281), and the issuance of a permit under section 402 of this Act (33 USCS § 1342) for the discharge of any pollutant by a new source as defined in section 306 of this Act (33 USCS § 1316), no action of the Administrator taken pursuant to this Act (33 USCS §§ 1251-1376) shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 852) (42 USCS §§ 4321-4347);"

These Water Pollution Control Amendments (33 U.S.C. 1375) were passed by Congress almost concurrently with the amendments to FIFRA. (7 U.S.C. 136, et seq.).

Ordinarily, an investigation of the legislative history of a federal statute would be helpful in determining the intent of Congress. In the case of NEPA, this is not productive. (See "Environmental Law," Environmental Law Institute, pp. 256-267, 1974, and "NEPA In the Courts," pp.106-123, 1973).

Furthermore, the Council on Environmental Quality, in its 1971 Guidelines (36 Fed. Reg. 7724), initially provided in § 5(d) as follows:

> "Because of the Act's legislative history, environmental protective regulatory activities concurred in or taken by the Environmental Protection Agency are not deemed acts which require the preparation of environmental statements under section 102 (2) (C) of the Act."

However, in 1973 the Council on Environmental Quality Guidelines (38 Fed. Reg. 20550) was a complete about-face in

that § 1500.4 (a) now provides as follows:

> "Section 102 (2) (C) of the Act applies to all agencies of the Federal Government."

The Conclusion is that Congress could have provided an exemption for the EPA from the requirements of NEPA and, in fact, did do so in the specific instance of the Federal Water Pollution Control Amendments of 1972. The narrow wording of § 511 (c) (1) suggests that Congress determined to provide an exemption only on a program-by-program approach to the question of EPA's compliance with NEPA.

The courts thus far have added only one other exemption and that is in the "Clean Air Act" cases, some of which are cited above. The Regional Administrator of the EPA (App. F, *Infra*, pp. 47-48), stated an official position of the EPA itself, indicating required compliance. The Council on Environmental Quality, in 1973, in its Guidelines, *supra*, has construed NEPA as requiring EPA compliance, or, stated another way, has eliminated its initial construction of the legislative history as not requiring compliance by EPA.

The decision of the Tenth Circuit Court of Appeals in this case represents the first holding by any court that the EPA is exempt in any case except "Clean Air Act" cases and the Federal Water Pollution Control cases. It is submitted, therefore, that Congress intended that "all agencies of the Federal Government shall" comply with NEPA, including the EPA, except in those particular programs where either a specific exemption is provided or a hearing procedure is promulgated which will assure input into the agency so that an informed decision may be made by it.

The second point in issue in this case is whether or not the courts are going to accept the "functional equivalent" theory of *Environmental Defense Fund v. EPA*, 489 F. 2d 1247 (D.C. Cir. 1973), which was repeated in the instant case in the majority opinion. The basis for such theory is that some procedure occurred within the federal agency which was equivalent to, and served the same purpose as, a formal EIS.

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In *EDF v. EPA*, *supra*, there were some seven months of public hearings held by the agency before it acted to suspend the registration of DDT. The court could see no useful purpose to be served by the filing of a formal EIS since an adequate input had occurred and an informed agency decision was apparent. The difficulty with applying the "functional equivalent" theory to the instant case is that a select, private, hand-picked committee was convened to write a report on the use of toxicants for predator control by the Council on Environmental Quality and the Department of the Interior. The majority opinion gives full credence to this report as being the functional equivalent of a formal EIS. However, as noted in the dissent by Judge Seth in this case, the report itself". . .contains a clear caveat that the data was not from carefully defined research directed to pertinent questions." The report itself states "it is impossible to know when one might go astry in drawing inferences from this type of information." Judge Seth points out that the report did not, itself, purport to be an objective analysis of the problem, but only of selected literature identified with proponents of a position on the subject. Judge Seth stated that "the Committee did not purport to do more than it did. It was perfectly frank, academic and straightforward in its decision that the urban position and wildlife dominance view should prevail."

The majority, on the other hand, accepts the Cain Report in laudatory terms, thus pointing up the inadvisability of an ad hoc case-by-case approach to the question of whether the EPA should file an environmental impact statement or should, in some other fashion, proceed to obtain the basis for agency action. It is submitted that the purpose of NEPA is subverted by such an approach. If a select, hand-picked committee can determine agency policy without input from the public and from those to be affected thereby, then every agency of the United States Government can follow suit and avoid NEPA requirements for an impact statement. If EPA is to be exempt, it should be by legislative determination and enactments, which have not yet occurred except in the limited and narrow provisions of the Water Pollution

Control Act.

Judge Seth, in his dissenting opinion, points out that the State of Wyoming was not a registrant, nor was the State a party to the cancelation procedures, and thus should not be charged with the Federal Government's failure to request a hearing contesting the original order.

In promulgating the order P.R. 72-2, complained of by petitioners, the EPA was not acting under NEPA, but under FIFRA, and as such was acting as a separate regulatory agency of the United States. It was not acting to enforce the provisions of NEPA, but the provisions of FIFRA under which it has enforcement duties. If the precedent established by the Tenth Circuit Court of Appeals decision is allowed to stand, it is difficult to justify the court's having required all other agencies of the Federal Government in such circumstances to comply with NEPA.

On petition for rehearing with the suggestion for a rehearing in banc, the Tenth Circuit Court of Appeals, by a vote of 4 to 3, denied a rehearing in banc, with Chief Judge Lewis and Circuit Judges Seth and Barrett voting for rehearing (App. E, *Infra*, pp. 45-46).

REASONS FOR GRANTING THE WRIT

The Tenth Circuit Court of Appeals decision has exempted from the requirements of the National Environmental Policy Act a federal agency which is, itself, a creature of this statute. Congress has not done so, although Congress has clearly recognized that in certain narrow instances the EPA should be excused because it is acting as an enforcer of the Act under the Water Pollution Control Act and the Clean Air Act, and detailed procedures are established in those Acts which the EPA must follow and which assure that affected parties will be heard prior to agency action. No such procedure is established under FIFRA where the EPA is acting to enforce its own provisions. Also, the Tenth Circuit Court of Appeals decision, in relying upon the Cain Report as a "functional equivalent" of an EIS, has opened a door through which a myriad of federal cases may follow in an

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attempt by the courts to determine on a case-by-case basis whether what was done by the EPA, or for that matter any federal agency, will be sufficient in lieu of a formal EIS as specifically required by NEPA.

Under Rule 19 of the Rules of the Supreme Court of the United States, petitioners submit that the Tenth Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted,

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APPENDIX A

United States Court of Appeals for the Tenth Circuit

STATE OF WYOMING, ET AL.

v.

STANLEY K. HATHAWAY, Secretary of the United States Department of the Interior, ET AL.

(No. 75-1491)

United States Court of Appeals, Tenth Circuit

(Argued Sept. 15, 1975; Decided Oct. 28, 1975)

Before HILL, SETH and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

This appeal seeks reversal of the judgment of the district court granting preliminary injunctive relief against the Administrator of the Environmental Protection Agency. The order enjoined the Administrator from taking any further action to enforce a certain numbered order, P.R. Notice 72-2 dated March 9, 1972, which suspended and cancelled the registration of three chemical toxicants, strychnine, sodium fluoroacetate (1080) and sodium cyanide, as economic poisons for use in predator control under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135 *et seq.* The predator which was the object of the poisoning program was the coyote.

The trial court found that the Administrator had failed to file a detailed Environmental Impact Statement prior to the issuance by him of the Pesticides Regulation Notice. The court said that the order constituted a major federal action significantly affecting the quality of the human environment in that it cancelled and suspended registration for certain poison products which we have mentioned. The court went on to say that since the order constituted major federal ac-

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tion, etc., the EPA was required under 42 U.S.C. § 4332 to file the detailed impact statement. The court further found that the Administrator had failed to take into account all possible approaches and alternatives and further found that the Administrator had not pursued a program which constituted a functional equivalent of furnishing a formal Environmental Policy Act report and that consultations with the plaintiffs had not been had. Finally, the court concluded that as a consequence of the failure to file an environmental impact statement, the P.R. Notice 72-2 suspending and cancelling registration to the poisons was invalid and would remain invalid until such time as a valid impact statement had been filed by the Environmental Protection Agency.

This appeal does not call upon us to review the merits of the Environmental Protection Agency order. Thus we do not weigh the value of the poison program against the injury or damage that it produces. We are concerned rather with the legality of the proceedings and, particularly, whether the trial court was justified in entertaining an injunction suit notwithstanding that no effort had been made to pursue the remedies provided by law, including review of the order of the Administrator by this court.

The specific issues which we here consider are:

1. Whether the Administrator of the Environmental Protection Agency is required to prepare a formal environmental impact statement prior to taking action suspending and cancelling a chemical toxicants registration under the Federal Insecticide, Fungicide and Rodenticide Act, *supra*.

2. Whether there has been a substantial compliance with the requirements of NEPA by the Administrator as a result of his having taken into account the so-called Cain Report, which was based on an objective and scientific study of the consequences of using the mentioned three poisons for predator control purposes and which measured the value to be derived from the use of the program as opposed to the in-

jury to non-target animals.

A determination of the mentioned issues furnishes the answer to whether the trial court acted correctly in entertaining an injunction suit and in granting temporary relief.

The evidence presented to the Administrator of the Environmental Protection Agency established to his satisfaction that a hazard existed which demanded immediate suspension of the registration of the pesticides and which also demanded suspension and cancellation of the registration. The plaintiffs-appellees did not seek administrative review of this order of suspension in accordance with the requirements of 7 U.S.C. § 735 (b) (c) within 30 days following the issuance of the order of the Administrator.[1]

The action of the Administrator of the Environmental Protection Agency Pesticides office was issued on March 9, 1972. In it Mr. Ruckelshaus, the then Administrator, stated that the previous spring the agency had made a public commitment to review the status of registrations for strychnine, cyanide and sodium fluoroacetate (1080) for use in prairie and rangeland areas for the purpose of predator and rodent control. The Administrator added: "This commitment grew out of grave concern surfaced by the reported deaths of some 20 eagles killed by the misuse of thablium sulfate." The Ruckelshaus opinion noted that the Secretary of the Interior was moved to also conduct a review of the government's federal predator control program.

The main thrust of the suspension and cancellation opinion was the existence of indiscriminate baiting which oc-

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[1]We recognize that this remedy is designed for parties who are directly affected by the suspension order, to-wit, the manufacturers or sellers. By the same token consumers, in this case sheep growers, are so remotely involved as not to be entitled to notice and hearing. They do nevetheless have a right to seek a review of the Environmental Protection Agency order in the United States Court of Appeals, this court. They failed to pursue this remedy.

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curs over wide ranging area of the prairie and the failure in carrying out this indiscriminate use to take any precautions for the protection of other animals, including endangered species. The mere toxicity was held not to be a basis for holding that the substance constituted a hazard, but "their degree of toxicity and pattern of use may well do so."[2]

The agency's statement of decision further noted that apart from its review and the Cain findings, a detailed petition had been submitted by several conservation groups urging the cancellation of the poisons in question. That petition

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[2]* * * The unattended and unsupervised use of poisons over large areas of land, by definition, poses a hazard to non-target species. The fact that label instructions contain directions for placing the baits at times and in areas least likely to be populated by non-target species and for policing them, afford slight, if any comfort. This Agency has on prior occasions taken into account a "commonly recognized practice" or use (see *In Re Hari Kari Lindane*, I.F. & R. (Docket #6), and has noted that the likelihood of directions being followed may affect their adequacy (see *In Re King Paint*, 2 ERC 1819 (1970)); *In Re Stearns*, 2 ERC 1364 (1970).

The hazards from the pattern of use for these chemicals is not remote or off in the distant future. The prairies and ranges are populated by numerous animals, some of which are becoming rare. At jeopardy are potentially endangered species. Each death to that population is an irremediable loss and renders such species closer to extinction.

No apparent circumstances exist to counterbalance this distinct hazard and suggest that the possibility of irremediable loss is outweighed by the harm that must occur from their non-availability during a period of suspension. The situation might well be different were the removal of these poisons from the market likely to affect human health or the supply of a staple foodstuff; or were there no apparent alternatives available, the balance might be differently struck. This, however, is not true.

invoked the provision of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), which requires that an economic poison contain "directions for use which are necessary and if complied with, adequate to prevent injury to living man and other vertebrate animals....", 7 U.S.C. § 135 (z) (2) (d), and it authorizes the Administrator to initiate cancellation proceedings by ordering suspension when he finds that such action is necessary to prevent hazard to the public. Based upon the review of the registrations of strychnine, cyanide and sodium fluoroacetate (1080), and in light of the available evidence, Ruckelshaus concluded that the registrations for predator uses should be suspended and cancelled.

The Administrator relied to a very great extent on the Cain Report, a carefully researched and well written document prepared by a study committee. This report was issued by the Advisory Committee on Predator Control at the University of Michigan on October 30, 1971. The study had been authorized in April 1971. The Department of the Interior together with the Council on Environmental Quality sponsored this study by a panel of which Stanley A. Cain was chairman. The panel reviewed and analyzed predator control and associated animal control policies of the United States. It evaluated their direct and indirect effects, including environmental impact on the livestock industry and considered alternatives to the present practices. The report of the committee formed a basis for the order which is now under attack. Its thrust was that the predator control program employed the subject poisons; that these poisons were nonspecific, and thereby posed hazards to threatened species.

The report also noted that the poison program, although governmental, primarily served the private industry of sheep growing. It recommended the use of truly specific poisons plus the use of repellents, reproductive inhibitors, live trapping and transplant procedures. Also supported was an extension system, whereby producers would be encouraged to solve their own problems by accepting methods directed

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toward specific animals. Still another recommendation of the study committee was the adoption of a federally based insurance program which would protect from all losses. The main emphasis of the report was the threat to endangered species from the widespread use of these poisons. Affected species singled out included the Bald and Golden Eagles, the California Condor, the Black-Footed Ferret, the mountain lion, the Grizzly Bear, Rocky Mountain Wolf and the Red Wolf.

The evidence at the trial consisted of testimony of one of the plaintiffs, a sheep rancher from Carbon County, Wyoming, a sheep and cattle rancher and the Acting Commissioner of Agriculture for Wyoming. These witnesses testified to lamb, sheep and cattle losses in Wyoming together with the levels of use of the three toxicants in question over the years 1965-74. Also introduced by the plaintiffs-appelees was the Cain Report together with the 1974 Predator Survey published by the Department of the Interior showing sheep loss figures for various years. Other evidence included deposition and exhibits which dealt with sheep loss figures.

If the Environmental Protection Agency was subject to the NEPA requirement that there be a study and the preparation of an impact statement prior to the issuance of the P.R. Notice 72-2, in other words is not immune from such preparation by reason of the fact that its function requires consideration of environmental factors, then the trial court would have had jurisdiction to halt the proceedings until such an impact statement had been issued unless it could be said that the Cain Report constituted the functional equivalent of an environmental impact statement.

It is our conclusion that in the present circumstances at least the Environmental Protection Agency was not compelled to follow out the procedures prescribed by NEPA including the preparation of an environmental impact statement; that it was error for the trial court to issue an injunction; that the appropriate remedy is review of the agency ac-

tion in this court.

In reaching this conclusion we repeat that we do not consider the merits of this controversy. We merely hold that a formal environmental impact statement was not required and that the trial court lacked authority to issue the preliminary injunction.

I.

ADEQUACY OF THE HEARINGS

The trial court based its decision on the failure of the Environmental Protection Agency to prepare an environmental impact statement as such prior to its order of suspension and cancellation. In the opinion which accompanied the issuance of the temporary injunction, the court brought out that the Environmental Protection Agency had not provided any functional equivalent of a formal Environmental Policy Act report and that the EPA order had been issued without input from or consultation with plaintiffs or their representatives; that in the absence of an adequate impact statement an injunction was proper.[3]

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 135 *et seq.*, does provide for a hearing if the party interested wishes to request one. *See* 7 U.S.C. §

[3]The decisions of our court together with the decisions of other Circuits have held that district court jurisdiction exists to enjoin the agencies *other than EPA* pending the preparation of a sufficient environmental impact statement. E.g., The Scenic Rivers Association of Oklahoma v. Lynn, Nos. 74-1520 and 74-1750 (10th Cir., filed July 30, 1975); Davis v. Morton, 469 F. 2d 593 (10th Cir. 1972); National Helium Corporation v. Morton, 455 F. 2d 650 (10th Cir. 1971); Harlem Valley Transportation Association v. Stafford, 500 F. 2d 328 (2d Cir. 1975); Swain v. Brinegar, 517 F. 2d 766 (7th Cir. 1975); Conservation Council of North Carolina v. Froehlke, 473 F. 2d 664 (4th Cir. 1973); Silva v. Romney, 473 F. 2d 287 (1st Cir. 1973).

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135 (b) (c). The section cited allows the Administrator to suspend or cancel the registration of an economic poison whenever it does not appear that the article or its labeling complies with the provisions of § 135 *et seq.* of this Act. When there is a determination that an economic poison is to be cancelled, the applicant or registrant is notified of this fact, for he is the primary party in interest rather than the consumers, who are here parties to the lawsuit. The applicant is given 30 days after service of notice of the refusal to file a petition requesting that the matter be referred to the advisory committee or file objections and request a public hearing in accordance with the Act. A cancellation of registration is effective 30 days after service of the foregoing notice unless ther is a demand for referral to an advisory committee or the filing of objections and request for a public hearing

There was no compliance by the registrant here, or anyone else for that matter, with the procedural provisions of this statute. Instead two years were allowed to pass and then various users of these poisons sought to avoid these administrative procedures by filing an action in district court for injunctive relief.

In addition to the review procedure there are provisions for having an advisory committee appointed including a representative of the National Academy of Sciences.

There is in addition a provision for judicial review by the court of appeals. 7 U.S.C. § 135 (b) provides that *any* person who is adversely affected by the order may obtain judicial review by filing with the United States Court of Appeals for the circuit wherein the person adversely affected resides or in the United States Court of Appeals for the District of Columbia Circuit. This review may be had within 60 days after the entry of the order. It goes on to provide that upon the filing of such petition, the court shall have exclusive jurisdiction to set aside the order complained of in whole or in part. The court of appeals is empowered to adduce additional evidence either before it or before the Administrator.

It cannot therefore be said that the interested parties were deprived of hearings at the administrative level or before this court. The fact is that they chose not to utilize these remedies provided by law and chose instead to seek injunctive relief, a remedy which was not available.

II.

WHETHER THE EPA WAS REQUIRED TO FILE AN ENVIRONMENTAL IMPACT STATEMENT

We have considered previously both sides of the issue whether an environmental impact statement is essential procedure. Thus, in National Helium Corporation v. Morton, *supra*, David v. Morton, *supra*, and The Scenic Rivers Association of Oklahoma v. Lynn, *supra*, we adopted the position that where an environmental impact statement is required by law, and where it has not been filed prior to the taking of agency action, there is a jurisdictional void which justifies the use of injunction to preclude further proceedings until a sufficient environmental impact statement is prepared and filed. On the other hand, we have recognized that the filing requirement is not invariable.

In Anaconda v. Ruckelshaus, 482 F. 2d 1301 (10th Cir. 1973), we considered this very issue, i.e., whether the EPA was subject to this NEPA requirement. We held in essence that inasmuch as the sole mission of EPA is that of improving the quality of the environment it would only serve to impede its efforts to compel it to stop what it is doing so as to file an impact statement. We observed that the contention of the plaintiff in that injunction action was lacking in merit, substance and jurisdiction. We added that the legislative history which is set forth in Portland Cement Association v. Ruckelshaus, 486 F. 2d 375 "clearly establishes that such a statement was not contemplated by Congress."

A number of decisions from other courts of appeals hold to this view. *E. g.*, Environmental Defense Fund v. EPA (DDT Suspension II), 489 F. 2d 1247 (D. C. Cir. 1973);

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Portland Cement Ass'n v. Ruckelshaus, 486 F. 2d 375 (D.C. Cir. 1973); Buckeye Power, Inc. v. EPA, 481 F. 2d 162 (6th Cir. 1973); Dusquesne Co.v. EPA, 481 F. 2d 1 (3d Cir. 1973); Appalachian Power Co. v. EPA, 477 F. 2d 495 (4th Cir. 1973); Getty Oil Co. (Eastern Operation) v. Ruckelshaus, 467 F. 2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). Moreover, the Supreme Court in United States v. Students Chal. Reg. Agcy. Pro. (SCRAP), 412 U.S. 669 (1973), recognized that 42 U.S.C. § 4332 does not apply to all agencies of the Federal Government. *Cf.*Portland Cement Ass'n v. Ruckelshaus, *supra*. (In fact, no decision that we are aware of holds to the contrary.)

At the time that NEPA was passed the EPA had not been organized.[4] Furthermore, the substance of NEPA is such as to itself exempt EPA from the requirement of filing an impact statement. Its object is to develop in the other departments of the government a consciousness of environmental consequences. The impact statement is merely an implement devised by Congress to require government agencies to think about and weigh environmental factors before acting.[5] Considered in this light, an organization like EPA whose

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[4]The EPA was created by Reorganization Plan No. 3, submitted to Congress on July 9, 1970 and became effective December 2, 1970. 35 Fed. Reg. 15623 (1970). *See* 42 U.S.C. § 4321 note.

[5]*See, e.g.*, Zabel v. Tabb, 449 F. 2d 119, 211 (5th Cir. 1970): "This Act essentially states that every federal agency shall consider ecological factors when dealing with activities which may have an impact on man's environment."

The Act also enables agencies which claimed they had no statutory authority to consider environmental factors to include such considerations. *See, e.g.*, Calvert Cliffs' Coordinating Committee v. Atomic Energy Comm'n 449 F. 2d 1109, 1112 (D.C. Cir. 1971): "Now, however, [the AEC's] hands are no longer tied. It is not only permitted, but compelled, to take environmental values into account."

regulatory activities are necessarily concerned with environmental consequences need not stop in the middle of its proceedings in order to issue a separate and distinct impact statement just to be issuing it. To so require would decrease environmental protection activity rather than increase it. If EPA fails to give ample environmental consideration to its orders, its failure in this regard can be corrected when the order is judicially reviewed,[6] but collateral review such as was sought here was never contemplated and is not to be allowed. To allow the use of district court injunction would constitute usurpation of the function granted to this court as well as a repudiation of our prior decisions. The question whether the EPA is forever and under all circumstances exempt from filing an environmental impact statement is not here being decided. Under the circumstances presented, it was clearly unnecessary for such a statement to be filed.

III.

WAS THE ADMINISTRATOR'S ACTION EQUIVALENT TO AN ENVIRONMENTAL IMPACT STATEMENT?

The trial court thought that it was not an equivalent. We have to disagree. A study of 42 U.S.C. § 4332 shows that Congress was seeking to require the government agencies to think about, and consider, environmental considerations in making decisions. It was not intended to force the agency to merely follow out a regimen. There are enough of these without imposing another.

Sub-section (C) specifically provides that all agencies of

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[6]*See, e.g.*, Environmental Defense Fund v. EPA (Aldrin-Dieldrin II), 520 F. 2d 1292 (D.C. Cir. 1975); Environmental Defense Fund v. EPA (DDT Suspension II), 489 F. 2d 1247 (D.C. Cir. 1973); Environmental Defense Fund v. EPA (Aldrin-Dieldrin I), 465 F. 2d 528 (D.C. Cir. 1972); Environmental Defense Fund v. EPA, 439 F. 2d 584 (D.C. Cir. 1971).

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the Federal Government shall

> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The Administrator's order, findings and conclusions substantially complied with the NEPA requirement.

The opinion, parts of which are quoted above, show that the problem was long considered to be a serious one. The Administrator had a good deal of information before him. Included was the Cain Report which itself was very similar in objectivies and in content to an environmental impact statement.

As we said in National Helium Corporation v. Morton, *supra*, NEPA does not call for any particular framework or procedure and so long as it is relevant and thorough it need not be extensive.[7]

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[7]In the *Helium* case we said:

> In oral arguments the appellees have expressed a desire for extensive administrative proceedings. We do not see any such requirement. This is an in-

The study and factual development which the Administrator pursued satisfied the standards of the Act of Congress. It was in our view a substantial equivalent to the statutory impact statement.

* * * * * *

The district court's judgment issuing a temporary injunction is reversed and the cause is remanded for further proceedings. Inasmuch as the amended complaint contains claims other than those which were here considered by the court, which claims have not been tried, we do not order the dismissal of the untried claims or the cause of action.

No. 75-1491 - STATE OF WYOMING et al v. STANLEY K. HATHAWAY etc. et al

SETH, Circuit Judge, dissenting:

I must respectfully dissent from the majority opinion.

In looking at the statutory provisions in effect at the time the administrative action took place, it appears that only a "registrant" could then ask for a post-order hearing. Also the record indicates that the only registrant in Wyoming was an agency of the federal government, the Bureau of Sport Fisheries and Wildlife. Thus a failure to ask for a hearing cannot be charged to the State of Wyoming.

The Act then provided, as it does now, that one adversely affected by an order could seek judicial "review" of the

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[7] Continued

tradepartmental matter in which the Secretary fulfills his obligation by following the mandate of the NEPA. Neither the APA nor the NEPA compels him to appoint an examiner and conduct hearings. Indeed, the Department has NEPA procedures in its manual. He ought to at least follow these. There is no indication that Congress in enacting the NEPA intended to impose extensive procedural impediments to Department action.

455 F. 2d at 656-57

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order by filing a petition in the United States Court of Appeals seeking to have the order set aside. It is difficult to determine what the court could have reviewed a that time for the State of Wyoming since there was no hearing and no record. This appears to have been a completely illusory remedy and a failure to seek it cannot be charged against Wyoming.

Thus under these circumstances there was no real administrative remedy available. The record is clear that the State sought relief from appropriate federal agencies when it became apparent that some administrative action was needed for the government to carry out its statutory duties to control predators. No administrative relief came about from these efforts.

I must also disagree with the majority in its position that no impact statement was required of the EPA, and anyway an equivalent was in existence.

As to the requirement that an impact statement be filed, the National Environmental Policy Act (42 U.S.C. § 4332) states that "all agencies" shall prepare such a statement. There is no provision for any exceptions and no indication that any were contemplated. Thus the courts should not create an exception for any reason, and not on the basis of a presumed expertise. It would not seem necessary to belabor the point in view of the mandate of the statute. This instance is a good demonstration as to why such a statement should be required of "all." Practice has developed the opportunity to give all groups a chance to air their positions during the preparation of such statements. This appears to be one of the reasons why the statements were required. "All" agencies must consider all the directions in which the impact of their major federal action may be felt.

Was the Cain Committee Report the "equivalent" of an impact statement? The Report was a compilation of a variety of published opinions, "studies," and statistical data compiled from a variety of sources. It did not really purport to be anything more than a synthesis of the literature initially prepared for, or by various organized groups. It contains a

clear caveat that the data was not from carefully designed research directed to pertinent questions. The Report then said of this: "It is impossible to know when one might go astray in drawing inferences from this type of information." The government now tries to read into the Report much more than the writers intended. It did not purport to be an objective analysis of this problem, but only of selected literature identified with proponents of a position on the subject. The Committee refused to consider data sought to be submitted by Wyoming. This kind of a report cannot be considered as a "functional equivalent" of an impact statement, and it is not fair to the Committee to try to do so. The Committee did not purport to do more than it did. It was perfectly frank and academically straightforward in its decision that the urban position and wildlife dominance view should prevail. This would seem to be apparent from its statement that the sheep industry was a dying one, and it was of aesthetic importance for the urban population to see coyotes. This position is well expressed, and is a perfectly acceptable one.

Thus no one can quarrel with the Cain Report when it is taken for what it is, and what it is supposed to be, but it cannot be used for something it is not—a functional equivalent of an impact statement.

One final observation. The only basis for the EPA action was misbranding of the poisons after some fifty years of use with the only registrant in Wyoming being the Wildlife Service. This does not appear to be anything close to imminent danger for an "emergency" contemplated by any relevant Acts. After such a period of use of the poisons under the guidance of the Wildlife Service, and by it, in the discharge of its statutory duties, anyone contending for a contrary position certainly should have to bear the burden of proof to support a change.

I would affirm the trial court.

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SEPTEMBER TERM—OCTOBER 28, 1975

Before the Honorable Delmas C. Hill, The Honorable Oliver Seth and The Honorable William E. Doyle, Circuit Judges

STATE OF WYOMING, ET AL.
Plaintiffs-Appellees

vs.

STANLEY K. HATHAWAY, ET AL.
Defendants-Appellants

vs.

WYOMING STOCK GROWERS ASSOCIATION
Intervenor-Appellee

75-1491 (D.C. No. C-74-34

This cause came on to be heard on the record on appeal from the United States District Court for the District of Wyoming, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is reversed in so far as it issued a temporary injunction. The cause is remanded to the United States District Court for further proceedings in accordance with the opinion of this Court. Seth, Circuit Judge, dissents.

HOWARD K. PHILLIPS, Clerk

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APPENDIX C

ENVIRONMENTAL PROTECTION AGENCY
PESTICIDES OFFICE
WASHINGTON, D.C. 20250

March 9, 1972

PR Notice 72-2

Pesticides Regulation Division

NOTICE TO MANUFACTURERS, FORMULATORS, DISTRIBUTORS
AND REGISTRANTS OF ECONOMIC POISONS

Attention: Person Responsible for Federal Registration of Economic Poisons

Suspension of Registration for Certain Products Containing Sodium Fluoroacetate (1080), Strychnine and Sodium Cyanide

I.

Last spring, this Agency made a public commitment to review the status of registrations for strychnine, cyanide, and sodium fluoroacetate (1080), for use in prairie and rangeland areas for the purpose of predator and rodent control. This commitment grew out of grave concern surfaced by the reported deaths of some 20 eagles killed by the misuse of thallium sulfate.[1]

This same concern caused the Secretary of the Interior

[1]This concern predates last summer. In 1963 the Secretary of Interior appointed an Advisory Board on Wildlife and Game Management chaired by Dr. Leopold of the University of California.

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to initiate a thorough review of the government's federal predator control program. An advisory committee was appointed under the chairmanship of Dr. Stanley Cain, Director, Institute for Environmental Quality and Professor of Botany and Conservation at the University of Michigan. The report of that advisory committee was released earlier this month.

Aside from this Agency's review and the Cain findings, a detailed petition has been submitted to this Agency by several distinguished conservation groups urging that the registrations of these compounds be cancelled and suspended immediately. That petition invoked the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135, Section 2z (2) (c) which requires that an economic poison contain "directions for use which are necessary and if complied with, adequate to prevent injury to living man and other vertebrate animals. . .," and Section 4c which allows the Administrator to initiate cancellation proceedings by ordering immediate suspension "when he finds that such action is necessary to prevent an imminent hazard to the public."[2]

Based on this Agency's review of the registrations of sodium cyanide, strychnine, and 1080 in light of available evidence, I am persuaded that their registrations for predator uses should be suspended and cancelled.

II.

The Cain group has dealt at length with the effects of the use of strychnine, cyanide, and 1080 for predator control. The report points out the extreme toxicity of these compounds, their non-selectivity, and their potential impact on

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[2]Sponsors of the petition were: The Natural Resources Defense Council, Defenders of Wildlife, Friends of the Earth, The Humane Society of the United States, National Audubon Society, Inc., New York Zoological Society, the Sierra Club, and the National Parks and Conservation Association.

the environment which "is increased by secondary hazard, accumulation in the animal, and combined characteristics of chemical stability and solubility in water." This report reconfirms the findings of the Leopold Report (see [1], *supra*) that the predator control program took a heavy environmental toll.

Cyanide, strychnine, and 1080 are among the most toxic chemicals known to man. They act quickly, spreading through an entire animal crippling the central nervous system. These poisons are toxic not only to their targets but other animals and wildlife. All of these poisons have a similar pattern of use as unattended baits and are spread over vast areas of open prairie.

In the case of strychnine use against badgers, coyotes, and foxes, a tablet containing the poison is placed inside a one-inch ball or cube of bait material such as meat, lard or tallow. These baits are left along animal trails or near non-game carcasses. While instructions caution the user to cover the baits over with chips or brush to avoid ingestion by non-target animals, the Cain Report has suggested the inadequacy of such directions.[3]

The pattern for cyanide use differs little in pertinent respects. An explosive gun, a "coyote-getter," charged with cyanide is baited and driven into the ground. The gun is left unattended along the trail or range and is triggered when an animal pulls at the bait. In the case of 1080, carcasses of dead animals are laced with the substance and strewn to attract the predator.

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[3]According to the Cain Committee, if toxicants were consistently applied under field conditions with meticulous ease, it is possible undesirable side-effects might be avoided. Draft at 131. However, the Committee concludes, "It appears that the necessary high standards are not likely to be attained." (Draft at 115) The Committee found no reliably precise data is available showing the degree of predator control achieved or the possible loss that might ensue without any program.

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Indiscriminate baiting over wide unpoliced areas poses two obvious and recognized threats to non-target animals that share the ranges as a natural habitat. The unsupervised bait is itself a potential killer of non-target range species. The threat, however, is compounded by the extremely high toxicity of these poisons, which can transform the predator carcass into a potential lethal killer of prairie animal life.

While the effects of prairie baiting are, for the most part, not documented, the Cain group has suggested the present evidence may well understate the true damage. It is appropriate to take administrative notice of the fact that isolated accidents involving wildlife are not apt to be reported. Isolated, even if routine and numerous, instances of secondary animal poisoning would not have the visibility of a wildlife "kill," nor is there apt to be an observer present as in the case of human mishap. The administrative process need not be blind to these realities. This Agency's Pesticides Registration Division has, moreover, reports of cases of alleged secondary and accidental poisoning, and recently range-use of 1080 has been suspected of killing birds, including some of our rare species.

Measured against these obvious threats to wildlife are only ill-defined and speculative benefits. The Cain Committee has noted the absence of any meaningul information on the efficacy of poison baiting, especially in relation to the economic loss caused by predators to the sheep industry. At least one state, Nevada, has estimated that the cost of predator control was ten times the value of livestock and poultry lost to predators.

This absence of any meaningful data of benefits derived from the use of these highly dangerous poisons which pose a marked potential threat to the environment readers these registrations suspect. It is now settled that the burden of proof rests on the poison. The report, moreover, specifically cites the greater selectivity of ground shooting, denning, and trapping, and the Department of the Interior is embarking on a study to determine other methods of control. Here, there it is known that alternative methods of control exist, the

registrations must be seriously questioned.

III.

In deciding whether or not these considerations justify suspension, it must be recognized that the concept of suspension is one that must evolve, and existing verbal tests are not readily translated into a decisive cue for action. The Federal Insecticide, Fungicide and Rodenticide Act, and the judicial and administrative constructions of it to date set forth only word formulas that establish a general attitude on suspension questions. Each situation must be scrutinized not only for what is involved, but also for what is not involved.

Turning to the verbal tests by which we must measure the use of these poisons, FIFRA provides that the Administrator of EPA "may, when he finds that such action is necessary to prevent an imminent hazard to the public, by order, suspend the registration of an economic poison immediately." "Public" is not to be viewed restrictively, and includes fish and wildlife, as has recently and forcefully been noted in an opinion of a federal court. See *EDF* v. *Ruckelshaus*, 439 F. 2d 584, at 597. Nor does "imminent" mean that we are on the "brink" and that the harm will occur tomorrow or has been documented.[4] It is sufficient that reasonable men can conclude that action taken today will with reasonable certainty lead to a loss in the future and that loss will be irremediable and uncorrectable by subsequent action, and that the apparent benefits from using a chemical, pending the complete statutory review process, are outweighed by the possible harm of use during the period.[5] Or, as the

[4]An 'imminent hazard' may be declared at any point in a chair of events which may untimately result in harm to the public. It is not necessary that the final anticipated injury actually have occurred prior to the determination that an 'imminent hazard' exists." *Reasons Underlying the Registration Decisions Concerning Products Containint DDT, 2,4,5-T, Aldrin and Dieldrin*, at 6.

[5]The cancellation proceeding involving the possibility

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matter was put in the Agency's DDT policy statement of March 18, 1971, the type, extent, probability and duration of such injury will be measured in light of the positive benefits accruing from use of the economic poison, for example, in human or animal disease control or food production.

Bearing these principles in mind, I am persuaded that a definite hazard exists. While the mere toxicity of poisons does not, under FIFRA, render them a hazard, their degree of toxicity and pattern of use may well do so. The unattended and unsupervised use of poisons over large areas of land, by definition, poses a hazard to non-target species. The fact that label instructions contain directions for placing the baits at times and in areas least likely to be populated by non-target species and for policing them, affords slight, if any comfort. This Agency has on prior occasions taken into account a "commonly recognized practice" of use (see *In Re Hari Kari Lindane*, I.F. & R. (Docket #6), and has noted that the likelihood of directions being followed may affect their adequacy (see *In Re King Paint*, 2 ERC 1819 (1970)); *In Re Stearns*, 2 ERC 1364 (1970).

The hazards from the pattern of use for these chemicals is not remote or off in the distant future. The prairies and ranges are populated by numerous animals, some of which are becoming rare. At jeopardy are potentially endangered species. Each death to that population is an irremediable loss and renders such species closer to extinction.

No apparent circumstances exist to counterbalance this distinct hazard and suggest that the possibility of irremediable loss is outweighed by the harm that might occur from their nonavailability during a period of suspension. The situation might well be different were the removal of these poisons from the market likely to affect human health or the supply of a staple foodstuff; or were there no apparent alter-

[5] Continued

of both a scientific advisory committee and public hearing consumes at least one year. In actual fact, these proceedings have generally taken considerably more than a year.

natives available, the balance might be differently struck. This, however, is not true.

I am hereby affixing findings of fact and an order suspending and cancelling these chemicals for use in predator control.

William D. Ruckelshaus
Administrator

FINDINGS OF FACT

Cyanide

1. Two products in the form of shells containing sodium cyanide are currently registered for explosive devices designed to kill coyotes that may prey on sheep. The device is simply a cyanide charge placed in a baited cylinder and driven into the ground. When the animal pulls at the bait the charge explodes into its mouth. Only one of the shell products is registered for use by the general public. The Division of Wildlife Services of the Department of the Interior has probably been the largest user of such devices.

2. Sodium cyanide is a water-soluble white-solid which reacts with acids to form hydrogen cyanide gas. This chemical is among the most toxic and rapidly acting of all known poisons.

3. Persons overcome by gas either die very rapidly from respiratory failure or recover completely within a relatively short time.

4. Ingestion or inhalation of a very low dose (as little as 300 micrograms per litre of air) may rapidly result in death.

5. There is no true effective antidote.

6. Recent data show four incidents involving cyanide compounds in fiscal year 1970 in three of which human beings were injured by the discharge of cyanide guns placed in fields. Only quick thinking on the part of all three victims in seeking immediate medical aid prevented any loss of life.

7. There is evidence that dogs have been subjected to

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poisoning by cyanide (used as outlined above) which is highly toxic to all wildlife and domestic animals.

Strychnine

8. Currently at least six products containing strychnine in tablet and technical powder form are registered for use in baits against coyotes and wolves.

9. The technical powder form is for reformulation and repackaging, and is for use only by professional pest control operators, and government agencies.

10. The tablets are available on the open market.

11. Strychnine is an extremely bitter-tasting white crystal.

12. It is a complex, naturally occurring, organic compound which would probably bind to soil readily and decompose over a period of time, although information on the persistence of strychnine and its effect on the environment is somewhat limited.

13. Strychnine is highly toxic to humans and animals, with 39 mg. considered as a threat to the life of an adult man. Death has, however, been reported with as little as 5 to 10 mg., and animal life may be acutely poisoned by ingestion of small amounts.

14. Strychnine acts by interfering with normal neural processes causing exaggerated muscle contraction and violent convulsion. Death in a rather gruesome form due to respiratory failure soon follows unless the seizures are controlled.

15. There is no true effective antidote.

1080 (Sodium Fluoroacetate)

16. Four products containing 1080 are currently registered for use as mammalian predacides.

17. Use is restricted to areas west of the 100th meridian, and then only by Division of Wildlife Services personnel, or under their direct supervision.

18. 1080 is a white powder, soluble in water, very stable, and thus very persistent in ground water.

19. 1080 is highly toxic to all species. The dangerous dose for man is 0.5 - 2 mg/kg. The chemical acts rapidly upon the central nervous and cardiovascular systems with cardian effects. Effect is usually too quick to permit treatment, and antidotes are relatively valueless.

20. According to one authority, prior to 1963 there were 13 proven fatal cases, five suspected deaths, and six non-fatal cases of 1080 poisoning in man, although it is not clear to what extent predator control materials were implicated.

21. There is evidence that a certain number of non-target animals are being adversely affected by 1080 products, particularly, in the case of carrion eating birds and mammals, by secondary poisoning. It is not clear, however, how various animal populations are being affected, although 1080 is thought to have contributed to the death of at least one California condor, an endangered species.

Benefits

22. There is no reliable data as to the amount of predator control achieved by the use of these poisons.

23. There is no reliable data as to the loss of sheep that might occur without a predator control program using these poisons, or of the real effect of such losses on the general economic health of the sheep industry. Certain data that are presently available indicate predator losses may in fact be of such a low magnitude as to be a minor part of total losses. The Cain Report suggests that among other reasons for the decline of the sheep industry may be competition from synthetic fibers and from lot-fed livestock.

24. For the maintenance of predator control programs, especially in the sheep industry, effective non-chemical alternatives exist, including denning, shooting and trapping, methods that have long been available and effective, though more costly than poisons.

25. The Federal Government has committed itself to a research program for methods of controlling predators other than poisons.

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CONCLUSION

The predator use of the foregoing chemicals presents an imminent hazard such as to warrant their suspension pursuant to § 4 (c) of the Federal Insecticide, Fungicide and Rodenticide Act.

ORDER

In accordance with the attached opinion and findings, it is hereby ordered that the registration for all products containing sodium Fluoroacetate (1080), sodium cyanide or strychnine for use against mammalian predators be cancelled and suspended immediately.

Registrations for those products bearing directions as listed above are hereby suspended and the products may not be legally shipped in interstate commerce until labeled to block out instructions for predator use.

William D. Ruckelshaus
Administrator

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING
Plaintiffs

vs.

ROGERS C. B. MORTON, ET AL.
Defendants

vs.

WYOMING STOCK GROWERS ASSOCIATION
Intervenor

No. C74-34

TEMPORARY INJUNCTION

The above-entitled matter coming on regularly before the Court on the 12th day of June, 1975, upon the motion for a preliminary injunction herein filed by plaintiffs, plaintiff State of Wyoming appearing by and through its attorney, George S. Andrews, the intervenor Wyoming Stock Growers Association appearing by and through its attorney, Glenn Parker, the remaining plaintiffs appearing by and through their attorney, Houston G. Williams, and the defendants appearing by and through their attorneys, Tosh Suyematsu, Assistant United States Attorney, and Gerald Fish, Justice Department, and the Court having heard the evidence and testimony adduced by and on behalf of plaintiffs and having considered and reviewed the affidavits and other material on file herein, and having heard the arguments of all counsel and being fully advised in the premises, Finds that the motion for preliminary injunction should be granted, and Further Finds that the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq*,m required the defendant Environmental Protection Agency to file a detailed en-

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vironmental impact statement prior to the issuance by the administrator of said agency of Pesticides Regulation Notice 72-2 dated March 9, 1972, for the reason that said order constituted a major federal action significantly affecting the quality of human environment in that it canceled and suspended registration for certain products containing sodium fluoroacetate (1080), sodium cyanide or strychnine against mammalian predators, and suspended registrations for those products and ordered that said products may not legally be shipped in interstate commerce for such purposes; and the Court Further Finds that the National Environmental Policy Act requires that such statement conform to the specific directives set forth in 42 U.S.C. § 4332; the Court Further Finds that prior to the issuance of said Notice the defendant Environmental Protection Agency did not file an environmental impact statement as required by said Environmental Policy Act, nor did said defendant take any action as required and intended by said Act to insure that said agency would have before it and would take into proper account all possible approaches and assure consideration of alternatives prior to the taking of the administrative action resulting in the promulgation of said order, such as holding of hearings and the giving of an opportunity to those vitally affected or to be affected by such agency action an opportunity to be heard before such action was taken; the Court Further Finds that the defendant Environmental Protection Agency, prior to the promulgation of said order, did not provide any functional equivalent of a formal Environmental Policy Act report, and, in fact, said order was issued without input from or consultation with plaintiffs or their representatives who have suffered and will suffer irreparable damage and loss as a result of said order.

The Court Further Finds that the evidence presented at the hearing of this matter clearly discloses that the individual and corporate plaintiffs and others within the State of Wyoming, represented by the plaintiff State of Wyoming, have suffered and will continue to suffer irreparable damage

and loss as a result of the issuance of said order, and the Court Finds that said order is invalid for all of said reasons and that a temporary injunction should be issued by the Court granting to plaintiffs relief from the effects of said order. NOW, THEREFORE, IT IS

ORDERED that the motion of plaintiffs herein filed for a preliminary injunction be, and the same is, hereby granted, as the Pesticides Regulation Notice 72-2 is invalid for the reasons set forth hereinabove; it is

FURTHER ORDERED that said defendant agency be, and the same is, hereby enjoined and restrained during the pendency of this action from taking any action for the enforcement of said order or for the implementation of the policies contained therein; it is

FURTHER ORDERED that said defendants take such administrative action as may be necessary to cancel and suspend the operation of said order until such time as said agency has complied with the said requirements of the National Environmental Policy Act of 1969; it is

FURTHER ORDERED that this temporary injunction shall remain in full force and effect until such time as the Environmental Protection Agency has fully complied with the aforesaid acts or until this cause is tried on the merits.

Dated this 23rd day of June, 1975.

EWING T. KERR, Judge

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APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING, ET AL.
Plaintiffs-Appellees

vs.

STANLEY K. HATHAWAY, Secretary of the United States Department of the Interior, ET AL.

(No. 75-1491)

United States Court of Appeals, Tenth Circuit

(Rehearing Denied Nov. 24, 1975)

Before The Honorable David T. Lewis, Chief Judge, The Honorable Delmas C. Hill, The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., The Honorable Robert H. McWilliams, The Honorable James E. Barrett and The Honorable William E. Doyle, Circuit Judges

This matter comes on for consideration of the various out-standing motions on file in the captioned appeal.

Upon consideration whereof, it is the order of the Court as follows:

1. The appellees' petition for rehearing is denied, and the suggestion for rehearing en banc is rejected. Circuit Judges Oliver Seth and James E. Barrett voted to granted rehearing en banc.

2. The appellees' motion to allow intervention by other interested parties, and the motions of Utah, South Dakota, and New Mexico for leave to intervene are denied.

3. The motion for immediate issuance of the mandate is denied.

HOWARD K. PHILLIPS, Clerk

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NOVEMBER TERM—DECEMBER 10, 1975

Before The Honorable David T. Lewis, Chief Judge, The Honorable Delmas C. Hill, The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., The Honorable Robert H. McWilliams, The Honorable James E. Barrett and The Honorable William E. Doyle, Circuit Judges

The Court has for consideration the necessity of the correction of a scrivener's error in the order issued and distributed by the Clerk of the Court on November 24, 1975.

Upon consideration whereof it is the order of the Court that the order issued November 24, 1975 is corrected *nunc pro tunc* and reissued reading as follows:

1. The appellees' petition for rehearing is denied, and the suggestion for rehearing en banc is rejected. Chief Judge David T. Lewis and Circuit Judges Oliver Seth and James E. Barrett voted to grant rehearing en banc.

2. The appellees' motion to allow intervention by other interested parties, and the motions of Utah, South Dakota, and New Mexico for leave to intervene are denied.

3. The motion for immediate issuance of the mandate is denied.

The Clerk shall distribute this corrected order to the parties of record.

HOWARD K. PHILLIPS, Clerk

APPENDIX F

Excerpt from the Readers Opinion Column
Denver Post September 26, 1975 Issue
Letter Submitted by John A. Green
Regional Administrator
U.S. Environmental Protection Agency
Region VIII
Denver

ROLE OF EPA AND OTHER FEDERAL AGENCIES IN DENVER WATER BOARD PROGRAMS

To the Denver Post:

You ran an editorial on Sept. 9 about the recent adverse ruling by the water referees in connection with the water supply expansion program by the Denver Water Board. The editorial made the following statement:

"Either the referee has made an uncommonly narrow ruling or he has misinterpreted delays caused by the Federal Environmental Protection Agency (EPA) as being lack of interest."

This statement is erroneous and misleading concerning the role of EPA in the Denver Water Board's expansion program.

EPA is not directly involved with the Denver Wate Board's expansion proposal. Consequently, EPA has no authority to delay this effort.

The Denver Water Board's proposed transmountain water diversion project and the Foothills water treatment project do involve several federal agencies and federal land or federal funds may be involved.

These federal agencies are in the process of evaluating the environmental impacts of these projects as required by the National Environmental Policy Act (NEPA). This act requires the federal agency to prepare an environmental impact statement when there are significant environmental impacts associated with a proposed project.

The environmental impact statement must be dis-

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tributed for review and comment by government agencies and the general public. The environmental impact statement is very important for the federal agencies involved to arrive at decisions which have completely considered potential environmental impacts, evaluated all reasonable alternatives and properly balanced environmental, social, economic and technical factors.

EPA is not responsible for administering the National Environmental Policy Act. EPA is subject to the requirements of that act the same as every other federal agency.

In the case of the Denver Water Board's project, EPA has provided some technical assistance to the federal agencies which are preparing the environmental impact statements, and EPA will review and comment on the environmental impact statements when they are completed.

Federal agencies directly involved will make the decisions after considering the comments of EPA, other agencies and the public.

JOHN A. GREEN
Regional Administrator,
U.S. Environmental
Protection Agency,
Region VIII

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CITATIONS

Cases:

Anaconda v. *Ruckelshaus*, 482 F.2d 1301	14
Appalachian Power Co. v. *Environmental Protection Agency*, 477 F.2d 495	14
Buckeye Power, Inc. v. *Environmental Protection Agency*, 481 F.2d 162	14
Duquesne Light Co. v. *Environmental Protection Agency*, 481 F.2d 1	14
Environmental Defense Fund v. *Environmental Protection Agency*, 489 F.2d 1247	14
Essex Chemical Corp. v. *Ruckelshaus*, 486 F.2d 427	14
Getty Oil Co. v. *Ruckelshaus*, 467 F.2d 349, certiorari denied, 409 U.S. 1125	14

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International Harvester Co. v. *Ruckelshaus*, 478 F.2d 615 14
Port of Boston, Marine Terminal v. *Rederi. Transatlantic*, 400 U.S. 62 13
Portland Cement Ass'n v. *Ruckelshaus*, 486 F.2d 375 ..... 14, 15
Ricci v. *Chicago Mercantile Exchange*, 409 U.S. 289 12
Sampson v. *Murray*, 415 U.S. 61 12
United States v. *SCRAP*, 412 U.S. 669 13
United States v. *Western Pacific R. Co.*, 352 U.S. 59 12
Weinberger v. *Bentex Pharmaceuticals, Inc.*, 412 U.S. 645 12

Statute and regulation:

Federal Insecticide, Fungicide, and Rodenticide Act, 61 Stat. 163, as added and amended, 7 U.S.C. 135 *et seq.*, and as further added and amended by the Federal Environmental Pesticide Control Act of 1972, 86 Stat. 973-999, 7 U.S.C. (Supp. IV) 136-136y:

Sec. 2(a), 7 U.S.C. 135(a) 3
Sec. 2(z)(2)(c), 7 U.S.C. 135(z)(2)(c) 3
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Sec. 3, 7 U.S.C. 135a 3
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Statutes and regulation—Continued Page

Sec. 4(a), 7 U.S.C. 135b(a) 2, 3, 2a
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Miscellaneous:

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1190

STATE OF WYOMING, ET AL., PETITIONERS

v.

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 13-27) is reported at 525 F.2d 66. The order of the district court granting a preliminary injunction (Pet. App. 41-43) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29) was entered on October 28, 1975. A timely pe-

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tition for rehearing and suggestion for rehearing *en banc* was denied by that court on November 24, 1975 (Pet. App. 45-46). The petition for a writ of certiorari was filed on February 20, 1976. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the petitioners were entitled to a preliminary injunction in 1975 with respect to the EPA Administrator's 1972 order suspending and cancelling the registration under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") of three poisons used to kill coyotes, on the sole ground that the Administrator's order was not accompanied by an environmental impact statement.

STATUTES INVOLVED

Sections 2(z)(2)(d), 3(a)(1), and 4(a), (c) and (d) of the Federal Insecticide, Fungicide, and Rodenticide Act, "FIFRA," 61 Stat. 163, as added and amended, 7 U.S.C. 135(z)(2)(d), 135a(a)(1) and 135b(a), (c) and (d) are reproduced in the appendix to this brief (*infra*, pp. 1a-8a).

STATEMENT

1. The Federal Insecticide, Fungicide, and Rodenticide Act

Under FIFRA,[1] every "economic poison" must be registered with the Administrator of the Environ-

[1] FIFRA has been substantially superseded by the Federal Environmental Pesticide Control Act of 1972 ("FEPCA"), 86 Stat. 973-999, as amended, 7 U.S.C. (Supp. IV) 136-136y.

mental Protection Agency before it may be shipped in interstate commerce, received in the original package, or distributed, sold or offered for sale in any Territory or the District of Columbia. 7 U.S.C. 135(a), 135a, 135b(a).

Among other requirements, a poison will not be registered if it is "misbranded." This term applies, *inter alia*, when the labelling lacks necessary warnings and directions for use, which if complied with, will be adequate to protect the public and to prevent injury to humans and other vertebrate animals, vegetation, and useful invertebrate animals. 7 U.S.C. 135(z)(2)(c) and (d).

Whenever it appears to the Administrator that an "economic poison" already registered does not comply with all requirements of the Act, he may issue a notice for cancellation of the registration. Cancellation becomes effective thirty days after service of the notice on the registrant unless the registrant corrects the defect, or petitions for an initial recommendation and report by a scientific advisory committee followed by an Administrator's order and an opportunity for public hearing, or objects to the

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However under Section 4 of FEPCA, certain sections of the new Act, to be implemented by regulations, did not become effective until the regulations were issued under a directory schedule contained in the new Act. FEPCA becomes fully effective in any event on October 23, 1977. In the meantime, the regulatory provisions of FIFRA, and regulations enacted thereunder are continued in effect. See note following 7 U.S.C. (Supp. IV) 136, and Section 4, Pub. L. 94-140 (approved November 28, 1975), 89 Stat. 751, 752-753.

cancellation and requests a public hearing. If a hearing is conducted the Administrator must base his decision on the hearing record and the advisory committee report, if any. 7 U.S.C. 135b(c). However, the Administrator may immediately suspend a registration when he finds such action necessary to prevent an imminent hazard to the public; in that event, the registrant is entitled to an opportunity for expedited hearing. *Ibid.* Final orders of the agency cancelling registrations are reviewable on petition within sixty days to the appropriate court of appeals by "any person who will be adversely affected" by the order. 7 U.S.C. 135b(d). The Administrator's factual findings must be sustained if supported by substantial evidence when considered on the record as a whole. *Ibid.*

2. The Administrative Action

In the spring of 1971, sparked in part by mounting public uncertainty about the efficacy and environmental consequences of the use of poisons for predator control, the Administrator of the then newly-created Environmental Protection Agency [2] initiated a review of the FIFRA registrations of strychnine, cyanide, and sodium monofluoroacetate

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[2] The Environmental Protection Agency was created by Reorganization Plan No. 3 which was submitted to Congress on July 9, 1970, and took effect on December 2, 1970, 35 Fed. Reg. 15623 (1970). Petitioners are in error when they assert (Pet. 11) that EPA is a creature of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.*

("1080") for use in prairie and rangeland areas for predator and rodent control. At about the same time the President's Council on Environmental Quality and the Department of the Interior created the Advisory Committee on Predator Control, chaired by Dr. Stanley Cain,[3] to study the use of these three poisons in predator control.

Various conservation groups also petitioned the Administrator for suspension and cancellation of the poisons' registrations. They invoked Section 135(z)(2)(d), which requires economic poisons to contain "a warning or caution statement which may be necessary and if complied with adequate to prevent injury to living man and other vertebrate animals * * *"; and Section 135b(c), which authorizes the Administrator to initiate cancellation proceedings and order immediate suspension "when he finds that such action is necessary to prevent an imminent hazard to the public" (Pet. App. 32).

The Cain Committee Report, released in January 1972[4] (PX No. 5), examined the existing federal predator control program, the economics of predator control, the ecology of the range and the roles of predator and prey, the relationship of coyote control to sheep losses, the various control techniques, the effect of the control program on rare and endangered

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[3] Director, Institute for Environmental Quality, and Professor of Botany and Conservation, University of Michigan.

[4] Predator Control-1971, Report to the Council on Environmental Quality and the Department of the Interior by the Advisory Committee on Predator Control (January 1972).

wildlife, the rabies question, possible livestock insurance programs, and particular public land problems. It found that the poisons and their use pattern were highly nonselective [5] and posed significant secondary poisoning hazards [6] (Cain Report, 63, 65). Deaths of nontarget species were found to have occurred among populations of "[a]lmost any carnivore or scavenger, bird or mammals, regardless of size" (Cain Report, 20, 22-23, 55-58, 67-72, 82-89). Continued use of the poisons as predacides presented a definite hazard to threatened or endangered species, including the Bald and Golden Eagle, California Condor, Black-footed Ferret, Mountain Lion, Grizzly Bear, Northern Rocky Mountain Wolf, and Red Wolf (Cain Report, 69-72, 82-89).

The report questioned the effectiveness of using the toxicants to reduce coyote populations in order to protect sheep and cattle. Food availability was found to be perhaps more important as a population determinant than the predacide program; in some States coyote populations increased with use of

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[5] A poison is nonselective when its use attacks not only the target animal (in this case, the coyote, whether it has killed livestock or not) but many nontarget animals as well. Of the three poisons, even when properly used, strychnine is least selective, followed by 1080 and sodium cyanide, in that order.

[6] Secondary poisoning is poisoning of another creature who comes in contact with the originally poisoned animal. The critical factor is the persistence of the poison in its lethal form in the poisoned animal. The longer this time period, the greater the secondary poisoning hazard. 1080 poses the greatest secondary poisoning threat, followed by strychnine and sodium cyanide, in that order.

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the poisons. Sheep loss variations could not be correlated to coyote population fluctuations.[7]

The Cain Committee recommended,[8] *inter alia*, that all existing toxicants be removed from registration and use for operational predator control; that, pending de-registration, use of toxicants in federal control programs be banned; and that the federal government take all steps necessary to protect predator species on the Endangered Species list (Cain Report, 5-6).

On February 8, 1972, the President issued Executive Order No. 11643, 37 Fed. Reg. 2875, ordering all agency heads to prevent the use of chemical toxicants, except in specified emergency situations, on any federal lands or in federal mammal or bird damage control programs where the toxicant was used to kill a predatory mammal or bird or where the toxicant has a secondary poisoning effect.

The Administrator's own review of the registrations of the three poisons was soon completed and

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[7] Rising cost, the lack of competent herders, competition from synthetic fibers, and grazing quota reductions were found to be far more significant than coyote predation as causes of the western sheep industry decline. Sheep losses were attributed to natural causes, such as birth defects, inadequate mother's milk, weather, disease, starvation and naturally toxic plants, as well as predation, with the latter accounting for no more than a three percent loss (Cain Report, 45-47, 60, 83).

[8] During the preparation of its report, the committee solicited and considered the views of numerous governmental and non-governmental organizations, including those of petitioners and the interests they represent (Cain Report, 195-197). These views were summarized and discussed in the final report (Cain Report, 106-110).

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he issued PR Notice 72-2 on March 9, 1972, cancelling and immediately suspending the registration of all products containing the three poisons for use against mammalian predators (Pet. App. 31-40). The Administrator relied on the Cain Report and his own findings, which paralleled those of the Cain Committee. The Administrator emphasized the unattended and unsupervised use patterns, the impact on endangered wildlife, the ill-defined and speculative benefits, and the existence of effective non-chemical alternative coyote control techniques.

The notice of suspension and cancellation was published in the Federal Register on March 18, 1972, 37 Fed. Reg. 5718. No registrant sought an agency hearing or referral to a scientific advisory committee,[9] and no other interested party petitioned the Administrator to grant a hearing as a matter of discretion. The cancellation automatically took effect thirty days later. 7 U.S.C. 135b(c).

3. The District Court's Decision

Two years after the Administrator's action, petitioners filed a complaint challenging not only PR Notice 72-2, but also Executive Order No. 11643 and the actions or inactions of the Secretaries of the Interior, Agriculture, Health, Education, and Welfare, as well as the Administrator of EPA. More than a year later, in April 1975, petitioners moved

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[9] The only registrant in Wyoming was the Bureau of Sport Fisheries and Wildlife of the Department of the Interior (Pet. App. 25).

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for a preliminary injunction, asserting that the Administrator's action in issuing PR Notice 72-2 (by then more than three years old) was invalid because he failed to prepare an environmental impact statement required by the National Environmental Policy Act (NEPA), 42 U.S.C. 4332. The district court granted the preliminary injunction and declared PR Notice 72-2 invalid on the sole ground that the Administrator had not prepared a formal environmental impact statement under NEPA. The court enjoined the EPA from implementing PR Notice 72-2 or its policies and directed it to cancel the notice until the agency had complied with NEPA. It held that petitioners would suffer irreparable damage and loss, but made no findings to support this determination. (Pet. App. 42).

4. The Court of Appeals' Decision

On appeal from the grant of the preliminary injunction, the court of appeals reversed, with one judge dissenting. The issues before the court did not involve the merits of the EPA Administrator's order, but "whether the trial court was justified in entertaining an injunction suit notwithstanding that no effort had been made to pursue the remedies provided by law, including review of the order * * * by this Court" (Pet. App. 14). The court held that the interested parties were not deprived of administrative hearings or judicial review; instead of utilizing the statutory remedies, they sued in the district court for "injunctive relief, a remedy which was not available" (Pet. App. 20-21). The court concluded

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that given the nature of the EPA Administrator's responsibilities under FIFRA, no purpose is served by requiring an environmental impact statement for the essentially environmental determination the agency must make, especially since any alleged failure by EPA to give ample environmental consideration to the issues is always subject to review in the court of appeals (Pet. App. 22-23). Finally, the court held that the Administrator's order substantially complied with the requirements of Section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)) that agencies consider environmental factors in their decisions (Pet. App. 23-25).

The dissenting Judge thought the direct review remedy was illusory, and disagreed with the majority's determination that no formal impact statement was required and its conclusion that a substantially equivalent analysis had been provided by the Administrator. He also stated that there was nothing close to an imminent danger from the use of the toxicants, and that anyone contending to the contrary should bear the burden of proof to support a change in the current registration and use status (Pet. App. 27).

ARGUMENT

1. Petitioners challenge the EPA Administrator's action under a statute—FIFRA—that Congress has decided to phase out and fully replace, by October 1977, with another statute having procedures that differ from those involved here (see note 1, *supra*). In this circumstance, there is no need for review by this Court.

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2. Even if, as petitioners claim, NEPA required an impact statement in the circumstances presented here, they were not entitled to the relief they sought —a preliminary injunction. Petitioners made no effort to request the Administrator to hold a hearing on the consequences of cancelling the registration of the three poisons involved.[10] Nor, as persons claiming to be adversely affected, did they seek timely judicial review of his order in the court of appeals under 7 U.S.C. 135b(d). Instead, they resorted to a belated collateral attack on the merits of the Administrator's order in the district court. After one year of litigation, and some three years after the order, petitioners sought a preliminary injunction on the ground, raised for the first time in their motion, that the absence of an environmental impact statement at the time of the Administrator's decision caused them irreparable injury. This long delay, and the

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[10] The court of appeals correctly recognized that petitioners have no basis to complain of the lack of hearings at the administrative level. Even though FIFRA grants an absolute right to a hearing only to registrants, petitioners could have petitioned the Administrator to grant them a hearing, as persons adversely affected, just as the conservation groups, who objected to use of the poisons petitioned the Administrator to initiate cancellation and suspension proceedings. Cf. 5 U.S.C. 554(c) (right to petition for rulemaking); and 5 U.S.C. 555 (c) (all interested parties must be given opportunity to submit views, subject to time, nature of the proceeding, and the public interest). Indeed, the new statute, FEPCA, codifies this principle by expressly providing that any "person adversely affected" may request a hearing in a cancellation proceeding. 7 U.S.C. (Supp. IV) 136d(b).

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district court's failure to make any findings linking their claimed injury to the absence of an impact statement, or even determining what their injuries were, must be balanced against the Administrator's findings of potential harm to the environment from indiscriminate distribution of the three poisons on the plains. Upon such a comparison, it is clear that there was no equitable basis for a preliminary injunction. See *Sampson* v. *Murray*, 415 U.S. 61, 84, n. 53.

Moreover, if petitioners are suffering irreparable injury because supplies of the poisons are no longer available, they may petition the Administrator to modify his order on the ground of new developments. They have in fact successfully invoked this remedy with respect to one method of administering cyanide to coyotes.[11] Fundamental principles of primary jurisdiction require that petitioners pursue the same remedies as to the other poisons. See, *e.g.*, *Weinberger* v. *Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 654; *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, 304-306; *United States* v. *Western Pacific R. Co.*, 352 U.S. 59.

Section 102(2)(C) of NEPA did not confer jurisdiction on the district courts to grant injunctive re-

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[11] On the basis of new developments since the 1972 order, the Administrator on November 3, 1975, approved Wyoming's application for the registration and use of a method of applying cyanide which, he has found, poses a minimal threat to the environment, to humans and to non-target animals. 40 Fed. Reg. 44726; 40 C.F.R. 164.130-164.133.

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lief when the EPA Administrator issues a suspension or cancellation order under FIFRA, which establishes a careful procedure for administrative determination and judicial review designed to expedite disposition of such orders. In this case, no one requested a hearing within thirty days after the Administrator's cancellation decision was published on March 18, 1972 (37 Fed. Reg. 5718). If petitioners were adversely affected by the decision, they could have sought judicial review, but they did not do so. They should not now be permitted to "force collateral redetermination of the same issue in a different and inappropriate forum." *Port of Boston Marine Terminal* v. *Rederi. Transatlantic*, 400 U.S. 62, 72. The court below correctly held (Pet. App. 23): "If EPA fails to give ample environmental consideration to its orders, its failure in this regard can be corrected when the order is periodically reviewed, but collateral review such as was sought here was never contemplated and is not to be allowed." See *United States* v. *SCRAP*, 412 U.S. 669, 694-695 (NEPA does not repeal by implication existing statutory systems of judicial review).

3. Because the determination EPA makes under FIFRA must turn primarily on environmental factors, the court of appeals found that little purpose would be served by requiring a formal environmental impact statement that evaluates the same factors.[12]

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[12] See also the superseding statute, FEPCA, which provides for cancellation of registration when it appears that a "pesti-

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There is no conflict among the courts of appeals on this point. Other courts of appeals have concluded that when the particular statute requires EPA to analyze unavoidable environmental effects, weigh alternatives, consider the relationship between local short-term use of the environment and long term productivity, and assess any irreversible and irretrievable commitments of resources, the requirements of Section 102(2)(C) of NEPA are met.[13] NEPA's purpose is "to require government agencies to think about and weigh environmental factors before acting" (Pet. App. 22), "not * * * to force the agency to merely follow out a regimen" (Pet. App. 23).[14] This

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cide * * * when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment." 7 U.S.C. (Supp. IV) 136d(b).

[13] *Anaconda* v. *Ruckelshaus*, 482 F.2d 1301, 1305-1306 (C.A. 10); *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375 (C.A.D.C.); *Essex Chemical Corp.* v. *Ruckelshaus*, 486 F.2d 427, 431 (C.A.D.C.); *International Harvester Co.* v. *Ruckleshaus*, 478 F.2d 615 (C.A.D.C.); *Buckeye Power, Inc.* v. *Environmental Protection Agency*, 481 F.2d 162 (C.A. 6); *Duquesne Light Co.* v. *Environmental Protection Agency*, 481 F.2d 1 (C.A. 3); *Appalachian Power Co.* v. *Environmental Protection Agency*, 477 F.2d 495 (C.A. 4); *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349, 359 (C.A. 3), certiorari denied, 409 U.S. 1125.

[14] *Environmental Defense Fund* v. *Environmental Protection Agency*, 489 F.2d 1247 (C.A.D.C.), held that no formal impact statement was required for EPA's cancellation of the FIFRA registration of DDT (489 F.2d at 1256):

> The explicit language in FIFRA requires that pesticides be deregistered if they will be injurious to man and his environment. The substantive standard established by the statute places great emphasis on the quality of man's

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does not mean that "EPA is forever and under all circumstances exempt from filing an environmental impact statement" (Pet. App. 23). But in the case of suspensions and cancellations based upon hazards to the public, adding formal requirements to the reasoned environmental analysis the Administrator must make under FIFRA, and its successor statute FEPCA (see note 1, *supra*, pp. 2-3), "would decrease environmental protection activity rather than increase it." (Pet. App. 23). See *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 383-384 (C.A.D.C.).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER R. TAFT,
Assistant Attorney General.

RAYMOND N. ZAGONE,
JACQUES B. GELIN,
JOHN J. ZIMMERMAN,
Attorneys.

MAY 1976.

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environment. Additionally, the procedural standards provide full opportunity for thorough consideration of the environmental issues, and for ample judicial review.

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APPENDIX

Extracts from Title 7, U.S.C.

§ 135. Definitions.

(z) The term "misbranded" shall apply—
(2) to any economic poison—

(d) if the label does not contain a warning or caution statement which may be necessary and if complied with adequate to prevent injury to living man and other vertebrate animals, vegetation, and useful invertebrate animals;

§ 135a. Prohibited acts.

(a) It shall be unlawful for any person to distribute, sell, or offer for sale in any Territory or in the District of Columbia, or to ship or deliver for shipment from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, or to receive in any State, Territory, or the District of Columbia from any other State, Territory or the District of Columbia, or foreign country, and having so received, deliver or offer to deliver in the original unbroken package to any other person, any of the following:

(1) Any economic poison which is not registered pursuant to the provisions of section 135b of this title, or any economic poison if any of the claims made for it or any of the directions for its use differ in substance from the representations made in connection with its registration, or if the composition of an economic poison differs from its composition as represented in

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connection with its registration: *Provided*, That in the discretion of the Administrator, a change in the labeling or formula of an economic poison may be made within a registration period without requiring re-registration of the product.

§ 135b. Registration of economic poisons.

(a) General requirement; single economic poisons; supplement statements; filing and contents of statements.

Every economic poison which is distributed, sold, or offered for sale in any Territory or the District of Columbia, or which is shipped or delivered for shipment from any State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or which is received from any foreign country shall be registered with the Administrator: *Provided*, That products which have the same formula, are manufactured by the same person, the labeling of which contains the same claims, and the labels of which bear a designation identifying the product as the same economic poison may be registered as a single economic poison; and additional names and labels shall be added by supplement statements; the applicant for registration shall file with the Administrator a statement including—

(c) Notification of noncompliance with requirements; corrections; refusal, suspension or cancellation of registration by Administrator; effective date of cancellation; advisory committees and procedures; objections; public hearings; Administrator's orders; consultation with other agencies;

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confidential information; public hazard suspension; orders reviewable; defense of registration.

If it does not appear to the Administrator that the article is such as to warrant the proposed claims for it or if the article and its labeling and other material required to be submitted do not comply with the provisions of sections 135 to 135k of this title, he shall notify the applicant for registration of the manner in which the article, labeling, or other material required to be submitted fail to comply with said sections so as to afford the applicant for registration an opportunity to make the corrections necessary. If, upon receipt of such notice, the applicant for registration does not make the corrections, the Administrator shall refuse to register the article. The Administrator, in accordance with the procedures specified herein, may suspend or cancel the registration of an economic poison whenever it does not appear that the article or its labeling or other material required to be submitted complies with the provisions of sections 135 to 135k of this title. Whenever the Administrator refuses registration of an economic poison or determines that registration of an economic poison should be canceled, he shall notify the applicant for registration or the registrant of his action and the reasons therefor. Whenever an application for registration is refused, the applicant, within thirty days after service of notice of such refusal, may file a petition requesting that the matter be referred to an advisory committee or file objections and request a public hearing in accordance with this section. A cancellation of registration shall be effective thirty days after service of the foregoing notice unless within such time the registrant (1) makes the necessary corrections; (2) files a petition requesting that

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the matter be referred to an advisory committee; or (3) files objections and requests a public hearing. Each advisory committee shall be composed of experts, qualified in the subject matter and of adequately diversified professional background selected by the National Academy of Sciences and shall include one or more representatives from land-grant colleges. The size of the committee shall be determined by the Administrator. Members of an advisory committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for time actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and subsistence expenses while so serving away from their places of residence, all of which costs may be assessed against the petitioner, unless the committee shall recommend in favor of the petitioner or unless the matter was referred to the advisory committee by the Administrator. The members shall not be subject to any other provisions of law regarding the appointment and compensation of employees of the United States. The Administrator shall furnish the committee with adequate clerical and other assistance, and shall by rules and regulations prescribe the procedures to be followed by the committee. The Administrator shall forthwith submit to such committee the application for registration of the article and all relevant data before him. The petitioner, as well as representatives of the Environmental Protection Agency, shall have the right to consult with the advisory committee. As soon as practicable after any such submission, but not later than sixty days thereafter, unless extended by the Administrator for an additional sixty days, the committee shall, after inde-

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pendent study of the data submitted by the Administrator and all other pertinent information available to it, submit a report and recommendation to the Administrator as to the registration of the article, together with all underlying data and a statement of the reasons or basis for the recommendations. After due consideration of the views of the committee and all other data before him, the Administrator shall, within ninety days after receipt of the report and recommendations of the advisory committee, make his determination and issue an order, with findings of fact, with respect to registration of the article and notify the applicant for registration or registrant. The applicant for registration, or registrant, may, within sixty days from the date of the order of the Administrator, file objections thereto and request a public hearing thereon. In the event a hearing is requested, the Administrator shall, after due notice, hold such public hearing for the purpose of receiving evidence relevant and material to the issues raised by such objections. Any report, recommendations, underlying data, and reasons certified to the Administrator by an advisory committee shall be made a part of the record of the hearing, if relevant and material, subject to the provisions of section 1006(c) of Title 5. The National Academy of Sciences shall designate a member of the advisory committee to appear and testify at any such hearing with respect to the report and recommendations of such committee upon request of the Administrator, the petitioner, or the officer conducting the hearing: *Provided*, That this shall not preclude any other member of the advisory committee from appearing and testifying at such hearing. As soon as practicable after completion of the hearing, but not later than

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ninety days, the Administrator shall evaluate the data and reports before him, act upon such objections and issue an order granting, denying, or canceling the registration or requiring modification of the claims or the labeling. Such order shall be based only on substantial evidence of record at such hearing, including any report, recommendations, underlying data, and reason certified to the Administrator by an advisory committee, and shall set forth detailed findings of fact upon which the order is based. In connection with consideration of any registration or application for registration under this section, the Administrator may consult with any other Federal agency or with an advisory committee appointed as herein provided. Notwithstanding the provisions of section 135a(c)(4) of this title, information relative to formulas of products acquired by authority of this section may be revealed, when necessary under this section, to an advisory committee, or to any Federal agency consulted, or at a public hearing, or in findings of fact issued by the Administrator. All data submitted to an advisory committee in support of a petition under this section shall be considered confidential by such advisory committee: *Provided*, That this provision shall not be construed as prohibiting the use of such data by the committee in connection with its consultation with the petitioner or representatives of the Environmental Protection Agency, as provided for herein, and in connection with its report and recommendations to the Administrator. Notwithstanding any other provision of this section, the Administrator may, when he finds that such action is necessary to prevent an imminent hazard to the public, by order, suspend the registration of an economic poison immediately. In such case, he shall

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give the registrant prompt notice of such action and afford the registrant the opportunity to have the matter submitted to an advisory committee and for an expedited hearing under this section. Final orders of the Administrator under this section shall be subject to judicial review, in accordance with the provisions of subsection (d) of this section. In no event shall registration of an article be construed as a defense for the commission of any offense prohibited under section 135a of this title.

(d) Judicial review; court of appeals; persons entitled to appeal, petition, record, jurisdiction, conclusiveness of findings, additional evidence, modification of findings and orders; Supreme Court; stay of administrative orders; calendar.

In a case of actual controversy as to the validity of an order under this section, any person who will be adversely affected by such order may obtain judicial review by filing in the United States court of appeals for the circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit, within sixty days after the entry of such order, a petition praying that the order be set aside in whole or in part. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Administrator, or any officer designated by him for that purpose, and thereupon the Administrator shall file in the court the record of the proceedings on which he based his order, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall have exclusive jurisdiction to affirm or set aside the order complained of in whole or in part. The findings of the Administrator with

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respect to questions of fact shall be sustained if supported by substantial evidence when considered on the record as a whole, including any report and recommendation of an advisory committee. If application is made to the court for leave to adduce additional evidence, the court may order such additional evidence to be taken before the Administrator, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper, if such evidence is material and there were reasonable grounds for failure to adduce such evidence in the proceedings below. The Administrator may modify his findings as to the facts and order by reason of the additional evidence so taken, and shall file with the court such modified findings and order. The judgment of the court affirming or setting aside, in whole or in part, any order under this section shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 18. The commencement of proceedings under this section shall not, unless specifically ordered by the court to the contrary, operate as a stay of an order. The court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this section. [Footnote omitted.]

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